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this Memorandum Decision shall not be
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**IN THE
COURT OF APPEALS OF INDIANA**

REX MICHAEL ENGLE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A03-0704-CR-175

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No.45G01-0402-FC-22

December 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Rex Michael Engle appeals his conviction of causing the death of another when operating a motor vehicle with an alcohol concentration equivalent to at least eight hundredths gram of alcohol per two hundred ten liters of breath, a Class C felony (“OWI causing death”). Engle raises two issues: whether the trial court improperly denied his motion for discharge pursuant to Indiana Rule of Criminal Procedure 4(C) and whether his conviction is supported by sufficient evidence. Concluding the trial court properly denied his Rule 4(C) motion and sufficient evidence supports his conviction, we affirm.

Facts and Procedural History

On January 27, 2004, Engle, who was driving his SUV, hit Russell Livingston, who was riding his bicycle. Engle stopped, entered a nearby bowling alley, and called the police. Highland Police Officer Chris Buuck arrived on the scene and found Livingston lying in the road with a large amount of blood near his head. Officer Buuck went to speak to the EMTs on the scene, and asked Engle to sit in his patrol car. Upon entering his patrol car, Officer Buuck noticed the odor of alcohol. Engle admitted having consumed two beers. Officer Buuck took Engle to the police station, where Engle passed all sobriety tests except the horizontal gaze nystagmus test. A chemical test revealed that Engle’s blood alcohol content was .10. Livingston subsequently died at the hospital as a result of injuries sustained in the accident.

On February 17, 2004, the State charged Engle with OWI causing death, a Class C felony. On March 3, 2004, the initial hearing took place. Following several motions and

requests to reset various hearings, on October 28, 2004, a jury trial was scheduled for May 23, 2005. On May 10, 2005, both parties moved to continue the jury trial, which was rescheduled for August 8, 2005. On August 8, the State filed a motion for continuance, which the trial court granted. The trial court's order states, "Based for reasons stated on the record and in open court, the continuance is charged to the defendant for purposes of Criminal Rule 4." Appellant's Appendix at 33. The trial court reset the jury trial for December 19, 2005. On December 19, both the State and Engle moved for a continuance, and the trial court reset the jury trial for July 26, 2006. Although the trial court attempted to hold a jury trial on that date, it declared a mistrial due to lack of available jurors and rescheduled the trial for November 20, 2006. On November 20, Engle filed a motion for discharge pursuant to Criminal Rule 4(C). The trial court denied this motion. The jury found Engle guilty as charged, and the trial court sentenced him to five years executed. Engle now appeals his conviction.

Discussion and Decision

I. Denial of Motion to Discharge Pursuant to Criminal Rule 4(C)

We review a trial court's denial of a motion for discharge pursuant to Criminal Rule 4(C) under the clearly erroneous standard, and will reverse "only upon a showing of clear error, that is, that which leaves us with a definite and firm conviction that a mistake was made." Paul v. State, 799 N.E.2d 1194, 1197 (Ind. Ct. App. 2003). Criminal Rule 4(C) states:

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date

the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

Engle was not tried within one year from his arrest. He claims that 576 of these days are not attributable to him,¹ and that therefore, he was entitled to a discharge. However, Engle did not object to his jury trial date until the day of his trial. “[A] defendant whose trial is set outside the one-year period must object to the setting at the earliest opportunity or the right to discharge under the rule is waived.” Brown v. State, 725 N.E.2d 823, 825 (Ind. 2000). “The defendant’s failure to object timely will be deemed acquiescence in the setting of the date.” Vermillion v. State, 719 N.E.2d 1201, 1204 (Ind. 1999). By failing to object to his trial date at any point prior to the day of his trial, Engle waived his right to be tried within one year.

Engle argues that the trial court committed reversible error by failing to enter findings of fact. Engle supports this argument by citing Ewing v. State, 629 N.E.2d 1238, 1240 (Ind. 1994), in which our supreme court reversed a trial court’s denial of a Rule 4(C) motion, stating, “the trial judge issued no findings of fact and law with respect to denial of the defendant’s motion for dismissal. Moreover, our examination of the record reveals no factual

basis to support the denial.” However, in this case, a factual basis does exist in the record for denying Engle’s motion – his failure to object to the scheduling of the trial. Therefore, Ewing is of no help to Engle. See id. at 1239-40 (“We will also presume that refusal of an application for discharge has been proper, even in the absence of a finding of fact and law, if a factual basis for such a determination exists in the record.”).

We conclude the trial court properly denied Engle’s motion for discharge.

II. Sufficiency of the Evidence

Our supreme court has recently summarized our standard of review when assessing claims of insufficient evidence.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court’s ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

In order to support Engle’s conviction, sufficient evidence must exist that Engle “cause[d] the death of another person when operating a motor vehicle . . . with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol per . . . two

¹ Engle does not explain how he arrives at this figure.

hundred ten (210) liters of the person's breath." Ind. Code § 9-30-5-5. Engle disputes only the causation element, and argues the evidence does not support a finding that his conduct caused the victim's death, and that instead, "the victim's intoxication of alcohol, marijuana, and cocaine, together with his behavior of riding his bike out of the parking lot into the center of the roadway were the substantial causes of the victim's death." Appellant's Brief at 16.

In regard to the causation element, it is not necessary that the driver's intoxication caused the death. Micinski v. State, 487 N.E.2d 150, 154 (Ind. 1986). However, "the State must prove the defendant's conduct was a proximate cause of the victim's . . . death." Abney v. State, 766 N.E.2d 1175, 1178 (Ind. 2002).

Although Engle points to evidence indicating that the victim's intoxication may have played some role in the accident, such fault of the victim does not preclude Engle's conviction. See Pollard v. State, 439 N.E.2d 177, 187 (Ind. Ct. App. 1982) (recognizing that regarding cases of driving intoxicated and causing death, "contributing fault of the victim is not fatal to the State's case"), disapproved of on other grounds, Powell v. State, 644 N.E.2d 855, 858 n.6 (Ind. 1994). At trial, Engle argued that the victim caused the accident and presented evidence of the victim's condition and actions. The State introduced evidence that Engle struck the victim's bicycle from behind, and that Engle told a police officer that "he basically just ran up behind the bicyclist and rear-ended him." Transcript at 495. It was the jury's province to weigh this evidence and determine whether Engle caused the victim's death. See Dawson v. State, 612 N.E.2d 580, 583 (Ind. Ct. App. 1993) (fact that victim was intoxicated at time of accident went to weight of the evidence); Rippy v. State, 493 N.E.2d

477, 480 (Ind. Ct. App. 1986) (recognizing the jury was entitled to reject the defendant's defense that the victim caused the accident), trans. denied. Given our standard of review, we conclude sufficient evidence supports Engle's conviction.

Conclusion

We conclude the trial court properly denied Engle's motion for discharge and sufficient evidence supports his conviction.

Affirmed.

KIRSCH, J., and BARNES, J., concur.